Petition

81-785

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

C.A. MAY MARINE SUPPLY COMPANY,
Petitioner,

vs.

BRUNSWICK CORPORATION
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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October 26, 1981

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the decision of the court below on the question of attorney's fees, which overlooks and is contrary to four decisions of the United States Supreme Court, should be reversed.

(2) After the plaintiff has obtained a judgment on liability, is it reversible error to exclude evidence of the actual market conditions relating to plaintiff's claimed lost future earnings.

PARTIES

C.A. May Marine Supply Company

Brunswick Corporation

TABLE OF CONTENTS

PAGE

Questions Presented for Review.....(i)

Parties.....(i)

Table of Contents.....(ii)

Table of Authorities.....(iii-iiii)

Opinions Below.....2

Jurisdiction.....2

Statutes Involved.....2

Statement of the Case.....3-6

Reasons for Granting the Writ.....7-26

Conclusion.....26

Appendix:

Appendix A - C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1649 (5th Cir. 1981)..... A

Appendix B- C.A. May Marine Supply Co. v. Brunswick Corp., N.D.Ga. (Jan.29, 1979 Order)..... B

Appendix C - C.A. May Marine Supply Co. v. Brunswick Corp., No. 79-1543 (5th Cir. July 29, 1981) (re-hearing denied)..... C

Appendix D - Notice of Appeal..... D

Appendix E - Wisconsin Fair Dealership Law..... E

TABLE OF AUTHORITIES

Bigelow v. R.K.O. Pictures, Inc., 327 U.S. 251 (1946).....4, 24

C.A. May Marine Supply Co. v. Brunswick Corp., 557 F.2d 1163 (5th Cir. 1977).....4

C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049 (5th Cir. 1981).....2, 6

Forman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962.....9, 14

Hoiness v. United States, 335 U.S. 297, 69 S.Ct. 70 (1948).....8, 10,15

J. Truett Payne Co. v. Chrysler Motors Corp., U.S. , 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981).....24

State Farm Mutual Automobile Ins. Co.v. Palmer, 350 U.S. 944, 76 S.Ct. 321 (1956).....8, 9,14

State Farm Mutual Automobile Ins. Co. v. Palmer, 225 F.2d 876 (9th Cir. 1955)..... 9, 13

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931)..... 24

Terkildsen v. Waters, 481 F.2d 201 (2d Cir. 1973).....16, 17

United States v. State of Arizona, 346 U.S. 907, 74 S.Ct. 239 (1953)...8, 9,13

United States v. State of Arizona, 206 F.2d 159 (9th Cir. 1953).....8, 12,13

Zenith Radio Corp. v. Hazeltine, Research, 395 U.S. 100 (1969).....24

STATUTES

Wisconsin Fair Dealership Law....2,4,5

OTHER

9 Moore's Federal Practice, para 203.18 at 3-37 (2nd Ed. 1980).....8

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

C.A. MAY MARINE SUPPLY COMPANY,

Petitioner,

v.

BRUNSWICK CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, C. A. May Marine Supply Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 6, 1981 and the order of July 29th, 1981 denying the petition for rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals which is reported at 649 F.2d 1049 (5th Cir. 1981) is reprinted as Appendix A. The opinion denying the petition for rehearing is reprinted as Appendix C. The opinion of the trial court which denied plaintiff's motion for new trial and ruled on costs and attorney's fees is reprinted as Appendix B.

JURISDICTION

The decision of the appellate court was entered July 6, 1981. A timely petition for rehearing was filed and the appellate court denied (per curiam) the petition for rehearing on July 29, 1981. (Appendix C).

STATUTES INVOLVED

Wisconsin Fair Dealership Law

This action was a diversity action filing a claim under the Wisconsin Fair Dealership Law. (Appendix E).

STATEMENT OF THE CASE

Plaintiff, C.A. May Marine Supply Co., a Mercury outboard motor dealership in Georgia, filed this action on January 22, 1976 for injunctive relief and damages resulting from the defendant's violation of the Wisconsin Fair Dealership Law in failing to renew plaintiff as a Mercury outboard motor dealer. In its answer, defendant essentially admitted that the termination violated the provisions of Wisconsin Law, but asserted that the Wisconsin Law did not apply to the contract.

On February 17, 1976 plaintiff filed a motion for judgment on the pleadings and alternative motion for summary judgment on the question of liability. Defendant responded with an opposing motion for summary judgment. On June 30, 1976 the trial court granted plaintiff's motion with respect to the issue of liability stating that the

Wisconsin Fair Dealership Law applied since the dealer contract between the parties stated it was "to be interpreted and construed according to the laws of the state of Wisconsin". The court then found that defendant's nonrenewal of plaintiff's franchise was in violation of the Wisconsin Fair Dealership Law.

On August 23, 1976, the trial court entered an order under 28 U.S.C. §1292(b) granting defendant's petition for leave to appeal the court's order on summary judgment. In a per curiam decision on August 19, 1977, the United States Court for the Fifth Circuit affirmed the trial court's summary judgment order in favor of plaintiff. See, C.A. May Marine Supply Co. v. Brunswick Corp., 557 F.2d 1163 (5th Cir. 1977). This left only the issue of damages for trial.

The case came on for trial on the issue of damages on October 10, 1978. At an un-

recorded in-chambers conference just before the opening of the trial, the trial court ruled as a matter of law that plaintiff was not entitled to attorney's fees under the Wisconsin Fair Dealership Law. On October 16, 1978 the jury returned a verdict in favor of the plaintiff in the sum of $7,027.00.

Following the trial, plaintiff-petitioner filed a motion for new trial, and also re-applied for attorney fees as part of the bill of cost so as to obtain a recorded ruling on the latter issue. In one order dated January 29, 1979, the trial court denied the motion for new trial, disposed of cost issues, and reaffirmed its earlier unrecorded in chambers ruling on the question of attorney fees. (Appendix B).

On February 21, 1979 plaintiff-petitioner initiated an appeal from that January 29, 1979 order by filing the following notice

of appeal:

NOTICE OF APPEAL

> Notice is hereby given that C.A. May Marine Supply Co., plaintiff in the above action, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order filed January 29th, 1979 denying plaintiff's motion for new trial.
> This 21st day of February, 1979.
> (Appendix D).

Based upon the language of this notice of appeal, the appellate court said that it lacked jurisdiction to rule on the question of attorney's fees, even though the lower court's ruling on that issue was written in the very same order in which it ruled on the motion for new trial. See, C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049 (5th Cir. 1981) (Appendix A). The appellate court also denied petitioner's petition for rehearing on this matter. (Appendix C).

REASONS FOR GRANTING THE WRIT

I.

The Appellate Court's Restrictive Reading of the Notice of Appeal So As to Deny Consideration of the Question of Attorney's Fees, Is Contrary to Four Decisions of the United States Supreme Court On This Exact Question.

The notice of appeal in this case states that plaintiff appeals from the "order filed January 29, 1979 denying plaintiff's motion for new trial". In that order the trial court denied plaintiff's motion for new trial, disposed of questions regarding plaintiff's bill of costs, and reaffirmed its earlier unrecorded ruling disallowing plaintiff's attorney fees.

Because plaintiff did not end its notice of appeal with a period after the date, "January 29, 1979", but redundantly described the order as the one "denying plaintifg's motion for new trial", the Appellate

Court below stated it lacked juristiction to decide the issue of attorney's fees even though that issue was also decided by the trial court in the same January 29, 1979 order. This ruling of the Court, is contrary to four long standing decisions of the United States Supreme Court on this subject.

In each of the following cases where appellate courts entered similar restrictive rulings, the United States Supreme Court "has been obliged...to remind the courts of appeals of [the original purpose of the requirement of a notice of appeal]:[1] Hoiness v. United States, 335 U.S. 297, 69 S.Ct. 70 (1948); United States v. State of Arizona, 346 U.S. 907, 74 S.Ct. 239 (1953), reversing per curiam United States v. State of Arizona, 206 F.2d 159 (9th Cir. 1953); State Farm Mutual

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[1] 9 Moore's Federal Practice para. 203.18 at 3-73 (2nd Ed. 1980).

Automobile Ins. Co. v. Palmer, 350 U.S. 944, 76 S.Ct. 321 (1956), reversing per curiam State Farm Mutual Auto Ins. Co. v. Palmer, 225 F.2d 876 (9th Cir. 1955); and Forman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962).

a) United States v. The State of Arizona, supra: In this case, the trial court made two separate rulings in a single order. One ruling was the dismissal of the Third-Party Complaint and the other was the dismissal of the case. Similarly, in the case now before the court a single order of January 29, 1979 denied the plaintiff's motion for new trial and affirmed an earlier denial of plaintiff's claim for attorney fees. In Arizona, the notice of appeal stated that the appeal was from "the order ...entered on the 6th day of October, 1952, granting the motion of the defendant State of Arizona to dismiss the Third-Party Complaint against the third-party defendant's."

It did not mention the portion of the order which dismissed the case. In virtually identical language the notice of appeal in the present case stated the appeal was from "the order filed January 29, 1979 denying plaintiff's motion for new trial." In Arizona, as in this case, the court of appeals held it did not have jurisdiction with regard to issues raised under the second portion of the order. Following a vehement dissent by appellate Judge Pope, the United States Supreme Court summarily reversed, sustaining Judge Pope's position and citing the Hoiness case, supra, as authority.

Judge Pope's dissent is of particular note, as it speaks exactly to the situation in the case at bar. He candidly stated:

> Again, the court cannot pretend that it is not fully advised by this notice of appeal just what appellant was undertaking to appeal from. Obviously the appeal was directed at the dis-

missal of the case which was contained in, and apart of, the order "entered on the 6th day of October, 1952".

What the majority have done is to disregard Rule 61:". . .the court at every stage of the proceeding must disregard any error or defect in proceeding which does not affect the substantial rights of the parties." They disregarded §2111 of Title 28:"...the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Just how far out of line this court is may be observed by comparing this deicison with Crump v. Hill, 104 F.2d 36 (5th Cir. 1939) ...[2]

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[2] In Crump v. Hill, supra, the Fifth Circuit early on made the following statement regarding such a technical attack on the notice of appeal requirement:

"It is true enough that starting an appeal ...requires conformity to the formal requirements of the Rule. But it would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the estremely simply procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights." (104 F.2d 36, 38).

> If the notice of appeal had merely referred to the order "entered on the 6th day of October, 1952, "and stopped there, or if it had followed this with the entire order, verbatim, I take it the majority here would have found it hard to void the appeal. But because in referring to the order the appellant has mentioned part of it only, it would seem that it has been guilty of an irregularity, and although no one has been misled or failed to understand what was intended, the appeal must be dismissed.
>
> Not only has the opinion here disregarded Rule 61 and §2111, supra, but it has given them a twist little short of astounding. (206 F.2d at 161, 162) (emphasis added).

The case at bar is identical to the situation in Arizona, supra, and must be made to be consistent with the mandate of the Supreme Court in United States v. State of Arizona, 346 U.S. 907, 74 S.Ct. 239 (1953).

b) In State Farm Mutual Automobile Insurance Co. v. Palmer, 225 F.2d 876 (9th Cir. 1955) the defendant filed a notice of appeal from an order denying a motion for new trial, identifying it by date. The

defendant in fact desired review of the judgment on the merits and should have appealed from the judgment originally entered. The Court of Appeals held the notice of appeal was ineffective to bring the judgment on the merits before it. The Supreme Court again summarily reversed the court of appeals on this issue. See, State Farm Mutual Auto Ins. Co. v. Palmer, 350 U.S. 944, 76 S.Ct. 321 (1956).

c) In Forman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962) the appellant mistakenly appealed from the orders of January 23, 1961 denying motions, when he should have appealed from a December 19, 1960 judgment dismissing the complaint. The Supreme Court again reversed the court of appeals stating:

> Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the

> motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to rely on appeal, submitted to both respondent and the court prusuant to rule, similarly demonstrated the intent to challenge the dismissal.
>
> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson, 355 U.S. 41, 48. The Rules themselves provide that they are to be construed 'to secure the just, speedy and inexpensive determination of every action.' Rule 1." (emphasis added).

d) Finally, there is the threshold decision of the Supreme Court of Hoiness v. United States, 335 U.S. 297, 69 S.Ct. 70 (1948), which was cited as authority for the summary reversals in both Arizona,

supra, and State Farm, supra. In Hoiness, supra, the appellant gave notice of appeal from an order dated October 14, 1946. Yet, in substance his appeal challenged an opinion of August 5, 1946. The Supreme Court allowed the appeal stating:

> "...[a]lthough the petition for appeal referred solely to the second order and not to the first, that defect was of such a technical nature that the Court of Appeals should have disregarded it..."

Petitioner here urges that the same basic authority of Hoiness, Arizona, and State Farm, should apply today.

In its opinion, without addressing any of these Supreme Court decisions, the appellate court below stated that where a particular part of the order appealed from is mentioned in the notice of appeal, the inference can be drawn that the unmentioned portion was not intended to be appealed, citing Terkildsen v. Waters, 481 F.2d 201

(2d Cir. 1973). Terkildsen, however, is a very different situation than presented in the case now before the Court. In Terkildsen, the plaintiff's notice of appeal specified that plaintiff was appealing that portion of the judgment entered in favor of the defendant on defendant's counterclaim. Later, plaintiff tried to inject an issue on the portion of the judgment regarding her own claim that was never presented to the court below. With respect thereto the Court stated:

> We think that plaintiff's notice of appeal, designating only defendants' recovery on the counterclaim as part of the judgment appealed from. . .manifests an intent to have the judgment on her own claim undistrubed. It seems that only after defendants took a cross-appeal challenging the award of interest on plaintiff's claim did plaintiff, as an afterthought, seek to enlarge her recoverable interest. As appellee with respect to the cross-appeal, she may not do so. (emphasis added).

The situation in Terkildsen, of appellee on a cross-appeal trying to inject a new issue as an afterthought is far different from the case at hand where the notice of appeal simply employed more description than the date in designating the order appealed form, and where the issue was briefed from the outset on appeal. The latter is identical to what occurred in Arizona, supra, which resulted in the reversal by the Supreme Court. Further, it is of note that Terkildsen, does not mention any of the landmark decisions of the Supreme Court on the topic, Hoiness, supra; Arizona, supra; State Farm, supra; or Forman v. Davis, supra.

For the foregoing reasons , petitioner requests that this petition for a writ of certiorari be granted.

II.

After the Plaintiff, Whose Business Was Destroyed by Defendant's Unlawful Conduct, Establishes Liability, It is Reversible Error for the Trial Court to Exclude Evidence of Actual Market Conditions Relating to Plaintiff's Lost Future Earnings

As support for the low award of lost future profits by the jury, the appellate court emphasized, based on the testimony of a Brunswick employee that: "because of the 1974 oil shortage" May [plaintiff] stated that...he was going to 'pull in his horns' and reduce both advertising and inventory." (649 F.2d at 1051). Yet, the court later stated that the exclusion of dealer call reports also prepared by Brunswick employees which showed the actual economic conditions in the market was "harmless error". It is unusual, that the court's very opinion refers to testimony of a Brunswick employee about Mr. May's

purported pessimistic prognosis of future economic conditions as supportive of the jury's low verdict of lost future profits. Yet, the Court finds harmless error in the exclusion of written reports of Brunswick employees which show actual, as opposed to prognosticated, economic conditions.

Also astonishing, was the appellate court's statement about these dealer call reports that, "only some 13 of 300 reports were tendered in evidence and, thus, there was presented a very real potential for misconception and distortion." (649 F.2d at 1054). Certainly, if the defendant had felt any of the other reports were helpful to its defense it could have tendered its own documents. It is incredible to think that 13 interoffice reports are not admissible simply because some 300 may have existed. How would such a strange precedent apply if a plaintiff sought to

introduce a piece of correspondence or other document that may have originated from defendant's files containing thousands of documents?

At trial, plaintiff's exhibit 78 through 91 were contact reports prepared by defendant which reflected the performance and market conditions of other similarly situated mercury dealers in the Atlanta area for the years 1975 through 1978. The other mercury dealers had prior sales patterns to be compared to plaintiff's (plaintiff's exhibits 76-1 through 76-6). The documents in question clearly showed that these other dealers experienced a recession in 1975 just as Mr. May testified was experienced by his business. More importantly, the documents set out a reliable "yardstick" by which to compare what reasonably could have been expected of plaintiff's business had the motor

franchise not been unlawfully taken away. Mr. May testified that the outboard motor industry experienced a severe recession in 1975, but based upon his observations of the economic conditions in the market place in 1976, 1977, and 1978, business would have been as prosperous in those years as it was in 1974. The contact reports clearly support Mr. May's testimony. For example, Exhibit 78 dated 4/1/75 which relates to a similar Mercury dealer in the Atlanta area says:

> "Mr. Poole says business real slow. (Dealer) says March 66% off from same time last year, floor traffic real slow."

Exhibits 79, 80 and 81 also dated in 1975, make similar statements about the slowness of business.

However, the reports show a very significant upswing in 1976. Exhibit 82 dated 11/4/76 states in part, "Business

more than doubled this past year". Exhibit 83 dated 1/18/77 states: "sales good". Exhibit 84 dated 4/22/77 states: "Dealer very busy with customers. Sold 3 rigs today but says last 2 weeks have been dead after biggest March in his history". (emphasis added). Exhibit 85 dated 5/27/77 states: "Dealer extremely busy." Certainly, is was reversible error for the trial court to exclude as irrelevant such strong evidence in support of Mr. May's testimony. The law has long recognized the extreme difficulty faced by a destroyed business in trying to prove how it would have performed but for its destruction. And, in light of such difficulty the exclusion of this "yardstick" evidence which came from the defendant's own files, was reversible error.

In this case where a business has been unlawfully excluded from the market place

the lenient standards for proving damages that are afforded antitrust plaintiffs should be applied. Recently, in J. Truett Payne Co. v. Chrysler Motors Corp., _U.S._, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981), the Supreme Court reaffirmed the importance of allowing wide latitude to the injured plaintiff in presenting damage evidence. Specifically, after discussing the long standing principles set out by Bigelow v. RKO Pictures, Inc., 1946--7, Trade Cases §57,445, 327 U.S. 251 (1946), Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931), and Zenith Radio Corp. v. Hazeltine Research, 1969 Trade Cases, §72,800, 395 U.S. 100 (1969), the Court emphasized:

> "Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The

> vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle articulated in cases such as Bigelow, that it does not "come with very good grace" for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.
>
> (1981-1 Trade Cases at pg. 76,238).

Clearly, the letter and spirit of this lenient standard has been ignored in the case at bar by the exclusion of the dealer call reports that reflected the market conditions experienced by similarly situated dealers who were not unlawfully excluded from operating their businesses. The general pronouncements of Bigelow, Story Parchment, and Truett Payne, are of little signigicance, unless they are given teeth by application to specific situations, as in this case, where damage evidence was improperly excluded.

In sum, the appellate court should not be permitted to employ the harmless error doctrine to emasculate the general but important principles of Bigelow, Story Parchment, as recently reaffirmed in Truett Payne.

CONCLUSION

For the reasons stated herein, petitioner urges that the petition for writ of certiorari be granted, that the decision of the appellate court be reversed, and that the case be remanded for a new trial.

Respectfully submitted,

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APPENDIX

APPENDIX A

C.A. MAY MARINE SUPPLY COMPANY,

Plaintiff-Appellant,

v.

BRUNSWICK CORPORATION,

Defendant-Appellee.

No. 79-1543

United States Court of Appeals

Fifth Circuit

July 6, 1981.

Appeal from the United States District Court For the Northern District of Georgia.

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

The appellant, C.A. May Marine Supply Company (May Marine), challenges the sufficiency of the damages awarded in its action against the appellee, Brunswick Corporation

(Mercury), for the wrongful termination of its franchise as a Mercury motors dealer. May Marine also raises several errors allegedly occurring in the trial on damages as well as the trial court's disallowance of attorney's fees. To put these allegations in context, we briefly review the facts.

May Marine offers a full line of boats, trailers, sailboats, canoes, parts and accessories and operates a shop for repairing marine equipment in the Atlanta metropolitan area. Since 1966 Mercury outboard motors were one of its many lines of merchandise. May Marine's right to sell Mercury motors was governed by a series of direct sales contracts. Each of the one-year agreements gave either party the right to terminate on thirty days notice, and specifically provided that Mercury was under no duty to enter into a new

contract for the following year. The parties agreed that the contractual obligations were to be "interpreted and construed according to the laws of the State of Wisconsin". The Wisconsin Fair Dealership Law provided that the grantor of a dealership must give the dealer 90 days notice of its intent not to renew and 60 days to rectify claimed deficiencies. [1]

Chester A. May, Jr. was the president and main shareholder of May Marine. His wife was the only other stockholder and officer in the corporation. Although he had been in the marine supply business for approximately 20 years, May had expressed concern about the future of the outboard motor business because of the 1974 oil shortage. A few weeks before he received notice that his dealership would not be renewed, May stated that within five years he intended to sell only accessories and that he was going

to "pull in his horns" and reduce both advertising and inventory.

On August 11, 1975, Mercury notified May Marine that it did not intend to enter into a new sales contract after the termination of the existing contract on August 31, 1975. Although Mercury complied with the express termination provisions of the direct sales contract, the cancellation was in apparent contravention of the Wisconsin dealership statute. May Marine filed an action on January 22, 1976 for injunctive relief and damages resulting from Mercury's alleged violation of the Wisconsin Fair Dealership Law in failing to renew May Marine as a Mercury outboard motor dealer. In its answer, Mercury contended that the Wisconsin law did not apply to the contract.

On June 30, 1976, the district court granted May Marine's motion for summary judgment on the question of liability,

holding that Mercury's nonrenewal of May Marine's dealership was in violation of the Wisconsin law. [2] In the per curiam opinion, this court affirmed the order of summary judgment in favor of May Marine. Only the issue of damages remained for trial.

At the trial on damages, the jury was required to determine whether May Marine had suffered injury by virtue of Mercury's breach of the contract, the extent of the damage, if any, and the sufficiency of May Marine's efforts to mitigate its losses. Much of the testimony centered on the measure of damages. Evidence was presented as to both the impairment of business' value overall and the loss of profits. May Marine's expert witness on damages testified that the business' value before August 31, 1975, was $153,468.00 and that immediately after the notice of nonrenewal the value was reduced to $58,898.00 and that as of

the trial date the business' value had declined to $9,989.00. In contrast, the defendant's expert witness stated that the business was worth $66,000.00 on August 31, 1975.

As far as lost profits were concerned, May could not state what percentage of his sales were attributable to outboard motors. However, the evidence revealed that while it carried the Mercury line, May Marine's average before tax earnings for the five years prior to termination was $6,910.00, $8,875.00 for the three years prior to non-renewal, and for the last year a sales loss of $4,506.00 and a net income before taxes of $1,970.00. Neither the change in value nor earnings attributable to loss of the motor dealership could be isolated.

Not until the trial did the judge make a determination of the measure of damages. On September 22, 1978 and prior to trial,

May Marine deposed a witness with respect to certain charts and information he had compiled, purportedly to aid defense counsel in the preparation of his case on damages. During the deposition the witness was instructed by counsel not to answer questions pertaining to the charts. The attorney claimed that the charts were protected by the "work product" privilege. Counsel for May Marine did not file a motion to compel discovery of this material. Instead, both parties joined in an amendment to the pre-trial order which stated that charts and tables of Mercury's experts would not be supplied or identified until the trial court ruled on the appropriate measure of damage.

This determination was not made until the morning of the trial. Charts prepared for use at trial were then shown by Mercury to May Marine in accordance with the amended

pretrial order. The charts were used extensively at trial, and, when they were finally tendered, no objections were made to their admissibility. Counsel for May Marine submits that any objection was mooted by the judge's statement prior to admission that "I am going to let them all in for whatever they may be worth. That's for the jury to say."

May Marine sought to introduce into evidence contact reports prepared by Mercury's sales personnel showing the business conditions experienced by other Mercury dealers in the Atlanta area. These reports disclosed that the other dealers uniformly experienced an extreme recession in 1975 followed by great increases in sales during 1976, 1977 and 1978. On objection by Mercury, the contact surveys were excluded. However, the trial court thereafter admitted over objection May Marine's offering of a

computer printout showing sales of Mercury outboard motors to Mercury dealers statewide during 1970-1978. The records did not include the sales of motors from the Mercury dealers to the public.

May Marine also offered a customer survey petition maintained at May Marine's business establishment for some six months shortly after the cancellation of the dealership. The survey basically asked the customers three questions: (1) Did May Marine "push the sale of Mercurys"? (2) Did May Marine give "good service"? (3) Should May Marine continue as a "Mercury dealer"? It was May Marine's contention that the survey weighed on the subject of lost future profits because it reflected customer loyalty and the business reputation of May Marine in the community. However, the trial court sustained Mercury's objection and refused to admit the survey on the ground that

customer opinion on the merits of the termination was irrelevant.

Mitigation of damages, or the lack thereof, was another issue at the trial. The evidence reveals that May delayed seven months after nonrenewal before meeting with representatives of the manufacturer of Johnson outboard motors. He made no attempt to secure a dealership for the Chrysler line of motors. Although he was party to discussions in November, 1975, directed toward acquisition of an Evinrude motor dealership, he subsequently withdrew his request. Finally, May refused to consider Mercury's December, 1977 offer to reinstate his dealer status. This latter alleged refusal to mitigate, May maintains, was in fact the rejection of a settlement offer made after suit had been filed in 1976.

The trial of damages began on October 10, 1978. Six days later the jury returned

a verdict in favor of May Marine in the sum of $7,027.00. May Marine filed a motion for a new trial and, two days later, a bill of costs seeking attorney's fees, despite the trial judge's statement at a chambers conference just before trial that May Marine was not entitled to recover attorney's fees. Mercury filed a motion to review and disallow costs, attacking the attempt to tax as costs May Marine's attorney's fees. On Janaury 29, 1979, the district court passed on the two motions in a single order denying the motion for new trial and disallowing attorney fees as costs. The appellant filed a notice of appeal "from the order filed January 29, 1979, denying plaintiff's motion for new trial." It asserts that the damages award was grossly insufficient and that the trial court erred in its rulings on the charts, the contact reports, the customer survey and the

attorney's fees.

[1,2] It is within the discretion of the trial judge to grant a new trial where the jury verdict is inadequate. A refusal to do so is subject to reversal for abuse of discretion only where the jury's verdict is without factual support in the record. McKinzie v. Fleming, 588 F.2d 165 (5th Cir. 1979). We find no abuse here and affirm the district court award of $7,027.00 from nonrenewal of the sales contract.

[3] In Wisconsin dealership termination cases, standard damage principles apply. [3] As the trial judge instructed the jury, there are two general ways by which this dealer could have proved his damages for breach of the Wisconsin law incorporated in the contract.

[4,5] A showing of the profits lost by the dealer as a result of the breach of contract is the usual and most common pro-

cedure to prove the damage. Tr. at 14; Bigelow v. RKO Radio Pictures, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1945). [4] Where the business is new and the dealer goes out of business before he is able to compile an earnings record, the amount of lost profits is gauged by a "yardstick" study of the business profits of a closely comparable business. Lehrman v. Gulf Oil Corporation, 500 F.2d 659, 667 (5th Cir. 1974). Otherwise, the dealer's profit record prior to the violation is compared with his performance subsequent thereto. This method is often called the "before and after" theory. Lehrman v. Gulf Oil Corporation, 500 F.2d at 667. Because proof must be specially tailored for each dispute, a party may construct his case with a combination of supporting facts relevant to both lost profits theories. Lehrman v. Gulf Oil Corporation, 500 F.2d at 668.

[6] Loss of business value is the second major measure of damages in dealership cases. This method focuses upon the change in worth of a going concern after total or almost total destruction caused by a breach of contract. Tr. at 15. For cases discussing aspects of business value damages see generally, Carpa, Inc. v. Ward Food, Inc., 536 F.2d 39 (5th Cir. 1976). Both business good will and future profits are computed into the "going concern" value loss. Hence, damage awards which include recovery for lost future profits and "going concern" value are impermissibly duplicitous. Lehrman v. Gulf Oil Corporation, 500 F.2d at 664.

The trial judge admitted evidence on both the value and the lost profits concepts and he instructed the jury on their application. In looking back on the jury's verdict, we find the decision to be rational. We sur-

mise that the jury wisely rejected the "going concern" value measure of damages because the business was not tatally or almost totally destroyed after the cancellation and the entire diminution of the business' value from $153,468.00 as estimated by the appellant's expert to somewhere between $58,898.00 after termination and $9,989.00 on the date of trial, could not be traced to loss of sale of the Mercury outboard motors. Certainly the appellee could not have foreseen that collapse of the entire business would result from nonrenewal of one product line. See Restatement of Contracts, §330 (1932). Moreover, the alternate lost future profits measure of damages could most easily be calculated by the before and after criteria, rather than the yardstick approach, since May Marine was an ongoing business with a profit record. The award of $7,027.00 is

slightly above the yearly average profits of May Marine from 1969 through 1974. Furthermore, the decision to grant only one year's profit is reasonable. Had the appellant made any effort whatsoever to mitigate his damages by seeking to acquire another product,[5] his actual losses would have been much closer to $7,027.00.

The trial judge's denial of a new trial was correct in light of the adequacy of the jury verdict and the lack of reversible error in the trial. Thus, we reject the appellant's argument that, because of certain evidentiary rulings, the verdict should be vacated and the case remanded for retrial.

[7] The exclusion of the contact reports was not erroneous because the information may have misled the jury and was of little relevance. The reports merely contained general comments from various dealers about

their businesses, rather than statistical and financial data concerning Mercury outboard motor sales. Moreover, only some 13 of 300 reports were tendered in evidence and, thus, there was presented a very real potential for misconception and distortion. Finally, the relevance of this evidence was questionable, since here lost profits were more appropriately measured by reference to May Marine's own past profitability than by the yardstick method. We note that even if the contact reports should have been admitted, their exclusion was harmless error.[6] Computer printouts showing the outboard motor sales to every Mercury dealer in Georgia from 1970 through 1978 were thereafter admitted and could have been used to draw a more accurate picture of the other dealers' profitability.[7]

[8-12] The trial judge also correctly excluded the customer survey as irrelevant.

Surveys and customer questionnaires are admissible, if they are pertinent to the inquiry, upon a showing that the poll is reliable and was compiled in accordance with accepted survey methods. Baumholser v. Amax Coal Co., 630 F.2d 550, 552 (7th Cir. 1980). A survey may be of value if the document can demonstrate the participants' then-existing state of mind. Randy's Studebaker Sales, Inc. v. Nissan Motor Corporation, 553 F.2d 510, 520 (10th Cir. 1976); Holiday Inns, Inc. v. Holiday Out In America, 481 F.2d 445, 447 (5th Cir. 1973). Cf. Sears, Roebuck & Company v. All States Life Insurance Company, 246 F.2d 161, 171 (5th Cir. 1957). Such surveys are apparently admitted into evidence most frequently in trade name and trademark cases where the possibility of consumer confusion is at issue. See James Burrough Ltd. v. Sign of Beefeater, Inc., 540 F.2d 266 (7th Cir.

1976); Union Carbide Corporation v. Ever-Ready, Inc., 531 F.2d 366 (7th Cir.), cert. denied, 429 U.S. 830, 97 S.Ct. 91, 50 L.Ed. 2d 94 (1976); Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons, 523 F.2d 1331 (2d Cir. 1975).

The appellant urges that May Marine's survey is admissible as an expression of customer loyalty and of intent to continue dealing with May Marine in the future. Assuming the survey is probative of each signer's state of mind, the survey would withstand a hearsay objection. [8] But the measure of damages appropriate to this case is lost profits. Evidence tending to show business goodwill is not germane unless it demonstrates a "going concern" value. Furthermore, general predisposition to purchase products at May Marine is not reflective of how many of a certain item would have been purchased, i.e. what the quantum

of lost profits with regard to the terminated product line would have been. Any minimal relevancy was outweighed by the likelihood that some statements in the poll would prejudicially overemphasize Mercury's role of the "bad guy", a status bearing no relationship to the sum of lost profits.[9] We hold that the trial judge did not commit reversible error in excluding the customer survey.[10]

[13] The demonstrative use of the charts as well as the restriction on deposition testimony concerning them was in accordance with the federal rules and a procedure which the appellant accepted without objection. Consequently, the admission of the charts caused the appellant to suffer no prejudice which would require us to vacate the damages award and remand for a new trial.

The worksheet charts requested by the appellant during deposition had been pre-

pared by an accountant for appellee's counsel to aid in his analysis of the appellant's case. The lawyer for whom the information was compiled sought to terminate this line of discovery by evoking the work product privilege. Fed.R.Civ.P. 26 permits discovery of documents prepared for the opposing party in anticipation of litigation only upon a showing of need and inability to obtain equivalent material elsewhere without undue hardship. Fed.R.Civ.P. 26(b)(3) (1972). There was no undue hardship here; figures utilized by the appellee's accountant were drawn from the appellant's own files.

Even if the work product privilege was impermissibly claimed, the appellant ignored opportunities to raise both the challenge and the contention that the charts were erroneously admitted at the trial. No motion to compel discovery was filed by the

appellant. Instead, both lawyers agreed in the amended pretrial order that the appellee should retain its compilations until the trial court ruled on the proper measure of damages. When that decision was made and certain charts were admitted during the trial, the appellant neither objected nor moved for a continuance. In its motion for a new trial, it did not allege prejudicial use of the charts as a ground therefor. Nor did the fact that the trial judge announced his intention to admit the charts for the benefit of the jury negate its duty to make a timely objection.

Although the appellee responded to May Marine's contention that it is entitled to attorney's fees, it raises the question of whether May Marine's notice of appeal confers jurisdiction on this court to consider the disallowance of attorney's fees. The notice of appeal expressly refers to that

portion of the order denying the appellant's motion for a new trial. Because the district court's ruling in conference against attorney's fees was not articulated as a ground for new trial, the issue of fees is clearly not raised by appeal from the denial of the motion for new trial. The denial of attorney's fees in the same order is not mentioned. May Marine responds that it specifically designated the order appealed from, including the day of the order, thereby evidencing its intent to appeal all rulings therein, including the separate holding on the appellee's motion to disallow costs.

[14-16] Generally a notice of appeal "shall designate the judgment, order or part thereof appealed from." Fed.R.App.P. 3(c) (1980). However, a policy of liberal construction of notices of appeal prevails in situations where the intent to appeal

an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party. Simpson v. Norwesco, Inc., 583 F.2d 1007, 1009 n.2 (8th Cir. 1978). The party who makes a simple mistake in designating the judgment appealed from does not forfeit his right of appeal where the intent to pursue it is clear. Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734, 738-39 n.1 (5th Cir. 1980). See Hammond v. Public Finance Corporation, 568 F.2d 1362 (5th Cir. 1978); Jones v. Chaney & James Construction Company, 399 F.2d 84 (5th Cir. 1968); Markham v. Holt, 369 F.2d 940 (5th Cir. 1966). Also, where claims or issues are inextricably entwined, each may be reviewed even though not referred to in the notice of appeal. Marshall v. Kirkland, 602 F.2d 1283, 1302 n. 17 (8th Cir. 1979). See also Comfort Trane Air Conditioning v. Trane Co., 592 F.2d 1373 (5th Cir. 1979);

In re Nissan Motor Corporation Antitrust Litigation, 552 F.2d 1088 (5th Cir. 1977). This circuit tends to be more lenient than other circuits in this respect.

[17,18] Where the appellant notices the appeal of a specified judgment only or a part thereof, however, this court has no jurisdiction to review other judgments or issues which are not expressly referred to and which are not impliedly intended for appeal. See Elfman Motors, Inc. v. Chrysler Corp., f.2d 1252 (3d Cir. 1977); Symons v. Mueller Co., 526 F.2d 13 (10th Cir. 1975). In this situation, because the intent to appeal is not apparent, prejudice to the adverse party is likely to result if review is granted. Where parts of the judgment are truly independent, there is more likelihood that the designation of a particular part in the notice of appeal will be construed as an intent to leave the un-

mentioned portions undistrubed. Terkildsen v. Waters, 481 F.2d 201, 206 (2d Cir. 1973); 9 Moore's Federal Practice, para. 203.18 at 3-78 (2d Ed. 1980). The January 27, 1979, order disposed of two separate motions on two separate issues - one a motion for new trial and the other to disallow the bill of costs including the request for attorneys fees. The express mention in the notice of appeal of one part of the order negated any inference of intent to appeal from the order as a whole. We therefore, lack jurisdiction to review the question of the appellant's right to attorney's fees.

The judgment of the district court is AFFIRMED.

FOOTNOTES

1
Wisconsin Fair Dealership Law, Wis. Stat. §135.

2
This ruling was affirmed on appeal in C. A. May Marine Supply Co. v. Brunswick Corp., 557 F.2d 1163 (5th Cir. 1977).

3
See Metropolitan Sewage Commission v. R. W. Construction, Inc., 78 Wis.2d 451, 255 N.W.2d 293 (1977); Howard v. State Farm Mutual Auto Liability, 70 Wis.2d 985, 236 N.W.2d 643 (Wis. 1975); Byrnes v. Mets, 53 Wis.2d 627, 193 N.W.2d 675 (1972); Dehnhart v. Waukesha Brewing Co., 21 Wis.2d 583, 124 N.W.2d 664 (1963).

4
Cases discussing damage issues frequently arise in the antitrust context. Similar conduct often provides the basis for both franchise law and antitrust violation charges. Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510, 512-516 (10th Cir. 1976). See generally Annot., 54 A.L.R.2d 324 (1973).

5
In the pre-trial order, the appellee claimed that May Marine could have mitigated its damages by seeking injunctive relief as authorized by the Wisconsin Fair Dealership Law, by actively seeking an outboard motor dealership from another manufacturer, by curing the reasons for nonrenewal, or by accepting the appellee's offers ultimately to continue with the existing dealership agreement. Record at 348.

6
No error in the exclusion of evidence is grounds for distrubing a judgment, if the error does not affect the substantial rights of the parties. Fed.R.Civ.P. 61 (1970). Because the other admitted evidence could have been used by the appellant to prove its point, it was not prejudiced by the rejection of the contact reports.

7
Although these printouts reflected manufacturer-to-dealer sales, and not dealer-to-customer sales, the statistics were indicative of the average number of engines ultimately reaching the customer through each dealership. This information would have been an alternative to the proffered contact sheets. Subpoenas could have issued at the plaintiff's request directing dealers to testify and produce relevant statistical date to strengthen its case.

8
All customers need not be polled. Similarly, all the responses from those questioned need not be introduced into evidence. Randy's Studebaker Sales, Inc. v. Nissan Motor Corporation, 533 F.2d 510, 520-21 (10th Cir. 1976).

9
As cited in the appellee's brief, customer statement included:
"This kind of action is surely a sign of the times. Doesn't loyalty mean anything anymore?"
"I think this is a prime example of trying to force small business out."

10
If the inadequacies in the survey had been technical, such as the format of the question or the manner in which it was the survey was taken, those shortcomings would have borne on the weight of the evidence, not its admissibility. Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510, 521 (10th Cir. 1976); Holiday Inns, Inc. v. Holiday Out In America, 481 F.2d 445, 447 (5th Cir. 1973). Because this survey lacked relevance to the issue at hand, however, it would have been error for the court to admit it.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORIGIA
ATLANTA DIVISION

C.A. MAY MARINE SUPPLY CO.:
:
v. : No. C76-132A
:
BRUNSWICK CORPORATION :

ORDER

On October 16, 1978, the jury found for the plaintiff in this diversity action in the amount of $7,027. The case is now before the court on plaintiff's motion for a new trial on the ground that the jury's award is inadequate under the evidence and on defendant's motion to review and disallow plaintiff's bill of costs.

1. The motion for a new trial, having been read and considered, is hereby DENIED.

2. The first specific item contained in

plaintiff's bill of costs to which defendant has objected is a witness fee in the amount of $1,425 for Dr. Albert Clark, an expert who testified for plaintiff. Defendant points out that only $22 of this sum is for statutory attendance and mileage fees, while the remainder, although unexplained, is apparently an expert witness charge. As the latter is clearly not taxable as costs, United States v. Kolesar, 313 F.2d 835, 837 (5th Cir. 1963); 6 Moore's Federal Practice, para. 54.77 [5.-3], defendant has quite properly requested a reduction in this portion of the claimed costs. The witness fees are accordingly REDUCED from $1,579 to $176.

Defendant next objects to the $1,268.24 claimed as costs incident to taking of depositions. Plaintiff has cured part of the objection by providing an itemization for the expense which reveals claims for

the original and/or copies for some nine depositions, as well as travel expenses for plaintiff's attorney to two of the depositions. Plaintiff then asserts that these costs should be awarded, as they are "extremely reasonable" in light of the case which has been litigated. Plaintiff's Brief, at 2.

As defendant correctly argues, travel expenses for counsel are not recoverable as part of costs. Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1170 (7th Cir. 1968), cert. denied 395 U.S. 908 (1969); 6 Moore's Federal Practice, supra, para. 54.77 [4]. By contrast, the cost of both the original and the duplicate copies of the deposition transcripts may be recovered if plaintiff can demonstrate that they were "necessarily obtained for use in the case". 28 U.S.C. §1920(2); see United States v. Kolesar, supra, at 837-40; Sperry

Rand Corp. v. A-T-O, Inc., 58 F.R.D. 132, 137-39 (E.D. Va. 1973); 6 Moore's Federal Practice, supra. In this regard, two of the items claimed by plaintiff were used at trial, which items total $89.66; the purpose and need for the remainder has not been explained. The use made by plaintiff of the former appears to the court to be sufficient to justify an award of costs, see Sperry Rand Corp., supra, at 138-39, but the rest of the claimed expenses must be disallowed, as plaintiff has made no effort to carry its burden of justification and the court cannot assume that the expenses were necessary, even with respect to the deposition of the owner of plaintiff. Accordingly, costs incident to taking of depositions are REDUCED from $1,268.24 to $89.66.

The final item to which defendant objects is plaintiff's request for attorney's fees.

The court ruled at trial that such fees are not recoverable in this action and sees no reason to further address the issue at this time. The claim is therefore DISALLOWED.

In summary, plaintiff's motion for a new trial is DENIED, and defendant's motion to renew and disallow plaintiff's bill of costs is GRANTED in part.

So ORDERED, this___day of January, 1979.

NEWELL EDENFIELD
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 79-1543

C. A. MAY MARINE SUPPLY COMPANY,

Plaintiff-Appellant,

versus

BRUNSWICK CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C. A. MAY MARINE SUPPLY COMPANY,	:	
Plaintiff,	:	
v.	:	No. C76-132A
BRUNSWICK CORPORATION,	:	
Defendant.	:	

NOTICE OF APPEAL

Notice is hereby given that C.A. May Marine Supply Co., plaintiff in the above action, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order filed January 29, 1979 denying plaintiff's motion for new trial.

This 21st day of February, 1979.

JOHN C. BUTTERS
Attorney for Plaintiff

APPENDIX E

Wisconsin Fair Dealership Law

Section 135.01 Short Title

This chapter may be cited as the "Wisconsin Fair Dealership Law",

135.02 Definitions

In this chapter:

(1) "Person" means a natural person, partnership, joint venture, corporation or other entity.

(2) "Dealership" means a contract or agreement, either expressed or implied, whether oral or written, between 2 or more persons, by which a person is granted the right to sell or distribute goods or services or use a trade name, trademark, service mark, logotype, advertising or other commercial symbol, in which there is a community of interest in the business of offering, selling or distributing goods or

services at wholesale, retail, by lease, agreement or otherwise.

(3) "Grantor" means a person who grants a dealership.

(4) "Community of interest" means a continuing financial interest between the grantor and grantee in either the operation of the dealership business or the marketing of such goods or services.

(5) "Dealer" means a person who is a grantee of a dealership.

(6) "Good cause means":

(a) Failure by a dealer to comply substantially with essential and reasonable requirements imposed upon him by the grantor or sought to be imposed by the grantor, which requirements are not discriminatory as compared with requirements imposed on other similarly situated dealers either by their terms or in the manner of their enforcement; or

(b) Bad faith by the dealer in carrying out the terms of the dealership.

135.03 Cancellation and alteration of dealerships

No grantor, directly or through any officer, agent or employee may terminate, cancel, fail to renew or substantially change the competitive circumstances of a dealership agreement entered into after the effective date of this act (1973) without good cause. The burden of proving good cause shall be on the grantor.

135.04 Notice of termination or change in dealership

Except as provided in this section, a grantor shall provide a dealer at least 90 days prior written notice of termination, cancellation, nonrenewal or substantial change in competitive circumstances. The notice shall state all the reasons for termination, cancellation, nonrenewal or

substantial change in competitive circumstances and shall provide that the dealer has 60 days in which to rectify any claimed deficiency. If the deficiency is rectified within 60 days the notice shall be void. The notice previsions of this section shall not apply if the reason for termination, cancellation or nonrenewal is insolvency, the occurrence of an assignment for the benefit of creditors or bankruptcy. If the reason for termination, cancellation, nonrenewal or substantial change in competitive circumstances is nonpayment of sums due under the dealership, the dealer shall be entitled to written notice of such default, and shall have 10 days in which to remedy such default from the date of delivery or posting of such notice.

135.05 Application to arbitration agreements

This chapter shall not apply to pro-

visions for the binding arbitration of disputes contained in a dealership agreement concerning the items covered in s. 135.03, if the criteria for determining whether good cause existed for a termination, cancellation, nonrenewal or substantial change of competitive circumstances, and the relief provided is no less than that provided for in this chapter.

135.06 Action for damages and injunctive relief

If any grantor violates this chapter, a dealer may bring an action against such grantor in any court of competent jurisdiction for damages sustained by him as a consequence of the grantor's violation, together with the actual costs of the action, including reasonable actual attorney fees, and the dealer also may be granted injunctive relief against unlawful termination, cancellation, nonrenewal or

substantial change of competitive circumstances.

135.07 Nonapplicability to motor dealers, distributors and wholesalers and door-to-door salesmen

This chapter does not apply to a dealership to which a motor vehicle dealer or motor vehicle distributor or wholesaler as defined in s. 218.01(1) is a party in such capacity. This chapter does not apply where the goods or services are marketed by the dealership door-to-door.

CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiff-Petitioner, C.A. May Marine Supply Company, hereby certifies that he has served, in accordance with the requirements of the Supreme Court Rules, three copies of the within and foregoing "Petition for Writ of Certiorari" upon Brunswick Corporation, by placing copies of same in the United States Mail, postage prepaid, addressed to:

Ronald L. Reid, Esq.
Alston, Miller & Gaines
1200 Citizens & Southern
National Bank Building
Atlanta, Georgia 30303

This 23rd day of October, 1981.

John C. Butters
JOHN C. BUTTERS

1515 First Atlanta Tower
2 Peachtree Street, N.W.
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Opposition

Office - Supreme Court, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVAS
CLERK

No. 81-785

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

C. A. MAY MARINE SUPPLY COMPANY,
Petitioner,

vs.

BRUNSWICK CORPORATION,
Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent
BRUNSWICK CORPORATION

QUESTIONS PRESENTED FOR REVIEW

I. Where a notice of appeal fails to reflect any intent to appeal the trial court's order denying recovery of attorney's fees, does the court of appeals have jurisdiction to review the district court's order denying such recovery?

II. Where a plaintiff has a profit and loss history upon which to base a showing of lost profits damages and the trial court admits comprehensive and reliable evidence from which plaintiff could show profitability of similar businesses, is it reversible error to exclude a limited sample of general comments about business conditions, which if admitted, would create the potential for misconception and distortion?

SUPREME COURT RULE 28.1 CERTIFICATE

Pursuant to Supreme Court Rule 28.1, Respondent certifies that it has no publicly held parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

TABLE OF CONTENTS

	Page
Questions Presented for Review	1
Statement of the Case	2
Summary of Reasons for Denying the Writ	3
Reasons for Denying the Writ	4
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Bach v. Coughlin, 508 F.2d 303 (7th Cir. 1974) 7

C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049 (5th Cir. 1981) 2, 5, 11, 12, 13

Cole v. Tuttle, 540 F.2d 206 (5th Cir. 1976) 7

David v. City of Scranton, 633 F.2d 676 (3rd Cir. 1980) 7

Donovan v. Esso Shipping Co., 259 F.2d 65 (3rd Cir. 1958), *cert. denied* 359 U.S. 907 (1959) ... 7

Drayton v. Jiffee Chemical Corp., 591 F.2d 352 (6th Cir. 1978) 7

Elfman Motors, Inc. v. Chrysler Corp., 567 F.2d 1252 (3rd Cir. 1977) 7

Foman v. Davis, 371 U.S. 178 (1962) 9, 10

Gannon v. American Airlines, Inc., 251 F.2d 476 (10th Cir. 1957) 7

Griffin v. Red Run Lodge, Inc., 610 F.2d 1198 (4th Cir. 1979) 11

Gunther v. E.I. DuPont De Nemours & Co., 225 F.2d 710 (4th Cir. 1958) 7

Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979) 7

Hoiness v. United States, 335 U.S. 297 (1948) 8, 9

Hysell v. Iowa Pub. Serv. Co., 559 F.2d 468 (8th Cir. 1977) 11

Klicker v. Northwest Airlines, Inc., 563 F.2d 1310 (9th Cir. 1977) 11

Koninklijke Luchtvaart Maatschaapij, N.V. v. United Technologies Corp., 610 F.2d 1052 (2d Cir. 1979) 11

L.C.L. Theatres, Inc. v. Columbia Pictures Indus., Inc., 619 F.2d 455 (5th Cir. 1980) 11

Moore v. Fowinkle, 512 F.2d 629 (6th Cir. 1975) 7

Ruckman and Hansen, Inc. v. Contracting & Material Co., 328 F.2d 744 (7th Cir. 1964) 7

SEC v. Sloan, 535 F.2d 679 (2nd Cir. 1976) (per curiam), *cert. denied* 430 U.S. 966 (1977) 7

Spound v. Mohasco Industries, Inc., 534 F.2d 404 (1st Cir.), *cert. denied* 429 U.S. 886, *reh. denied* 429 U.S. 988 (1976) 6, 7

State Farm Mutual Automobile Insurance Co. v. Palmer, 350 U.S. 944 (1956) (*per curiam mem.*), *rev'g* 225 F.2d 876 (9th Cir. 1955) 9, 10

Symons v. Mueller Co., 526 F.2d 13 (10th Cir. 1975) 7

Terket v. Lund, 623 F.2d 29 (7th Cir. 1980) 6

Terkildsen v. Waters, 481 F.2d 201 (2nd Cir. 1973) 6

United States v. Arizona, 346 U.S. 907 (1953), (*per curiam mem.*), *rev'g*, 206 F.2d 159 (9th Cir. 1953) 9

Whitehead v. American Security and Trust Co., 285 F.2d 282 (D.C. Cir. 1960) 7

Yoder v. Nutrena Mills, Inc., 294 F.2d 505 (8th Cir. 1961) 7

Statutes, Regulations and Rules:

Federal Rule of Appellate Procedure 3(c) 5

Fed. R. Civ. P. 61 13

Fed. R. Evid. 403 12

28 U.S.C. §777 (1946 ed.), R.S. §954 62 Stat. 992 §39 9

Wisconsin Fair Dealership Law, W.S.A. §135-06 11

Treatise:

9 *Moore's Federal Practice*, ¶203.18 at 3-77 7

No. 81-785

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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Petitioner,

vs.

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On Petition for Writ of Certiorari to
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for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

I. Where a notice of appeal fails to reflect any intent to appeal the trial court's order denying recovery of attorney's fees, does the court of appeals have jurisdiction to review the district court's order denying such recovery?

II. Where a plaintiff has a profit and loss history upon which to base a showing of lost profits damages and the trial court admits comprehensive and reliable evidence from which plaintiff could show profitability of similar businesses, is it reversible error to exclude a limited sample of general comments about business conditions, which if admit-

ted, would create the potential for misconception and distortion?

STATEMENT OF THE CASE

Petitioner is a seller, in the Atlanta, Georgia, metropolitan area, of marine and boating equipment, offering a full line of boats, trailers, sailboats, canoes, and related parts and accessories as well as repair service for marine equipment. Among the many lines of merchandise sold by Petitioner were Respondent's Mercury outboard motors. In August, 1975, Respondent notified Petitioner that it would not renew the sales contract pursuant to which Petitioner had been selling Respondent's Mercury outboard motors.

Petitioner filed this action seeking damages arising out of Respondent's non-renewal of Petitioner as a Mercury dealer. The case was tried before a jury in the United States District Court for the Northern District of Georgia, the Honorable Newell Edenfield presiding, solely on the question of the amount of damages incurred by Petitioner. The jury returned a verdict in Petitioner's favor of $7,027.00.

At trial Petitioner sought to introduce 13 of approximately 300 "contact reports" prepared by Respondent's sales personnel showing the "business conditions experienced" by other Atlanta area Mercury dealers. *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1052 (5th Cir. 1981) (*per curiam*). The reports contain "general comments" from the Mercury dealers rather than hard statistical and financial data. *Id.* at 1054. On objection by Respondent, the trial court ruled the contact reports inadmissible. Petitioner then introduced computer

printouts showing sales by Respondent to other Atlanta-area Mercury dealers. These printouts provided Petitioners a basis for showing the profitability of other Mercury dealers and general business conditions for all Atlanta area dealers. *Id.* at 1052, 1054.

After the trial Petitioner filed a motion for a new trial and a bill of costs. Petitioner sought in the bill of costs, but not in the motion for new trial, to have attorney's fees taxed as costs against Respondent. Respondent moved to review and disallow the bill of costs. In a document styled "Order," the district court entered two separate orders, one denying Petitioner's motion for new trial and the other granting in part Respondent's motion to review and disallow costs, including attorney's fees. *See* Appendix B-5 to Petition for Writ of Certiorari (hereinafter "Appendix ___").

Petitioner filed a notice of appeal stating that it appealed "from the order filed January 29th, 1979, denying plaintiff's motion for new trial." *See* Appendix D. The Fifth Circuit Court of Appeals affirmed on each of the several grounds Petitioner raised or attempted to raise. With respect to the issues presented in the instant Petition, the Fifth Circuit held (i) that it lacked jurisdiction to review the district court's denial of recovery of attorney's fees because the notice of appeal did not reflect any intent to appeal that order or part thereof of the district court, and (ii) that the district court correctly decided the evidentiary issue.

SUMMARY OF REASONS FOR DENYING THE WRIT

The Fifth Circuit correctly decided, consistent with numerous decisions in other circuits, that Petitioner's

notice of appeal did not confer upon it jurisdiction over the denial of attorney's fees. It is well accepted in numerous decisions of the courts of appeals that where a notice of appeal designates one order or part thereof, the notice is insufficient to confer jurisdiction over the unmentioned order or portion, because such a notice fails to show any intent to appeal from the unmentioned order or portion. The cases decided by this Court which are relied upon by Petitioner are consistent with the opinion of the court below. In each of those cases it was clear that the notice of appeal reflected an intent to appeal a certain issue even though the notice arguably designated the wrong order.

The Fifth Circuit and the district court also correctly decided the evidentiary question because (i) the dealer contact reports are irrelevant and immaterial, (ii) the danger of unfair prejudice and confusion substantially outweighs any probative value the reports might have, and (iii) any error in admitting the reports was harmless.

REASONS FOR DENYING THE WRIT

I. This Court Should Not Grant a Writ of Certiorari to Review the Fifth Circuit's Decision With Respect to the Notice of Appeal.

A. The Fifth Circuit Correctly Found the Notice of Appeal Insufficient Because the Notice Designated for Appeal Only the Denial of Petitioner's Motion for New Trial and Showed No Intent to Appeal the Denial of Attorney's Fees.

The content of a notice of appeal is governed by

Federal Rule of Appellate Procedure 3(c), which provides: "The notice of appeal shall . . . designate the judgment, order *or part thereof* appealed from . . . ." (Emphasis added.) In the instant case petitioner's notice of appeal designated the part of the district court's "Order of January 29, 1979 denying Plaintiff's Motion for New Trial." Applying Rule 3 to the notice of appeal, the Fifth Circuit held that the notice was insufficient to confer upon it jurisdiction over the "question of the appellant's right to attorney's fees." 649 F.2d at 1056. The court relied upon the well-accepted principle that "[w]here the appellant notices the appeal of a specified judgment only *or a part thereof*, however, this Court has no jurisdiction to review other judgments or *issues* which are *not expressly referred to and* which are *not impliedly intended for appeal.*" *Id.* (emphasis added). This principle is based upon the presumption that designation of a particular part of an order or a particular issue in an order "will be construed as an intent to leave the unmentioned portions undisturbed." *Id.* (emphasis added). Where no intent to appeal from the unmentioned portion can be found, "prejudice to the adverse party is likely to result if review is granted." *Id.*

The above principles clearly were applied correctly by the Fifth Circuit in this case. Petitioner sought to obtain a new trial in its motion for a new trial; it separately sought to recover attorney's fees in its bill of costs. In a document styled simply "Order," Appendix B, the district court entered two separate orders, one on Petitioner's motion for a new trial and the other on Respondent's motion to review and disallow plaintiff's bill of costs. Specifically the district court stated, "In summary, plaintiff's motion for a new trial is DE-

NIED, and defendant's motion to review and disallow plaintiff's bill of costs is GRANTED in part." Appendix B at p. B-5. Thus, there were two separate orders contained in the district court's "Order," relating to two entirely unrelated issues brought before the court by two different motions. In its notice of appeal Petitioner stated only that it "hereby appeals . . . from the Order filed January 29, 1979 *denying plaintiff's motion for a new trial.*" Appendix D (emphasis added). The notice neither expressly nor impliedly makes any mention at all of the order granting in part defendant's motion to review and disallow plaintiff's bill of costs. Thus, there is not even the slightest suggestion of intent to appeal with respect to the order denying recovery of attorney's fees, and accordingly the notice failed to confer jurisdiction over the denial of attorney's fees.

B. The Fifth Circuit's Decision is Consistent with Numerous Decisions in Other Circuits.

Employing the same reasoning as did the Fifth Circuit in this case, other circuits have similarly refused to entertain appeals on questions relating to attorney's fees and interest where the notice of appeal did not specifically designate for appeal the court's ruling on attorney's fees or interest. *Terket v. Lund*, 623 F.2d 29, 32-33 (7th Cir. 1980); *Spound v. Mohasco Industries, Inc.*, 534 F.2d 404, 410 (1st Cir.), *cert. denied* 429 U.S. 886, *reh. denied* 429 U.S. 988 (1976); *Terkildsen v. Waters*, 481 F.2d 201, 206 (2nd Cir. 1973); *See also David v. City of Scranton*, 633 F.2d 676 (3rd Cir. 1980). The basic principle relied upon by the Fifth Circuit in this case has long been accepted and applied

by the courts of appeals for other circuits. *First Circuit, Spound, supra*; *SEC v. Sloan*, 535 F.2d 679, 681 (2nd Cir. 1976) (*per curiam*), *cert. denied*, 430 U.S. 966 (1977); *Second Circuit, Terkildsen, supra*; *Third Circuit, David v. City of Scranton, supra*; *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1253-54 (3rd Cir. 1977); *Donovan v. Esso Shipping Co.*, 259 F.2d 65, 68 (3rd Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *Fourth Circuit, Gunther v. E.I. DuPont DeNemours & Co.*, 255 F.2d 710 (4th Cir. 1958); *Fifth Circuit, Cole v. Tuttle*, 540 F.2d 206 (5th Cir. 1976); *Sixth Circuit, Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352, 361 (6th Cir. 1978); *Moore v. Fowinkle*, 512 F.2d 629, 631 (6th Cir. 1975); *Seventh Circuit, Terket, supra*; *Hampton v. Hanrahan*, 600 F.2d 600, 642 (7th Cir. 1979); *Bach v. Coughlin*, 508 F.2d 303, 306 (7th Cir. 1974); *Ruckman and Hansen, Inc. v. Contracting & Material Co.*, 328 F.2d 744, 749 (7th Cir. 1964); *Eighth Circuit, Yoder v. Nutrena Mills, Inc.*, 294 F.2d 505, 506 n.1 (8th Cir. 1961); *Tenth Circuit, Gannon v. American Airlines, Inc.*, 251 F.2d 476, 482 (10th Cir. 1957); *Symons v. Mueller Co.*, 526 F.2d 13, 19 (10th Cir. 1975); *D.C. Circuit, Whitehea[illegible] American Security and Trust Co.*, 285 F.2d 282, 286 (D.C. Cir. 1960). A leading commentator on federal procedure has taken the same position. 9 *Moore's Federal Practice*, ¶203.18 at p.3-77 - p.3-78.

C. The Supreme Court Cases Cited by the Petitioner are Clearly Distinguishable from the Instant Case Because the Notice of Appeal at Issue in Each of Those Cases Clearly Designated the Issue the Appellant Intended to Appeal.

The Petition for a Writ of Certiorari on the question of attorney's fees relies almost entirely upon four cases previously decided by this Court. Those four cases are clearly distinguishable from, and consistent with, the opinion of the court below as well as the many decisions of other circuit courts cited above. In each of the four cases decided by this Court, the notice of appeal clearly demonstrated the intent of the appellant to appeal with respect to a certain issue or final judgment. In each case a court of appeals held that the appellant had arguably designated for appeal an order that was not appealable; in each case this Court reversed.

In *Hoiness v. United States*, 335 U.S. 297 (1948), the district court entered an order on August 5, 1946, dismissing the case and on October 14, 1946, it entered findings of fact, conclusions of law and a decree. The petitioner appealed from "the rulings, findings, judgment and decree made and entered herein on October 14, 1946," omitting any reference to the order of August 5, 1946. The Court of Appeals for the Ninth Circuit dismissed the appeal, reasoning that the August 5 order was the final order and that the October 14 decree was not appealable. *Id.* at 299-300. This Court reversed, reasoning that, "It seems to us hypertechnical to say that the appeal papers did not bring the *sole*

issue of the case fairly before the Court of Appeals."[1] *Id.* at 301 (emphasis added). The factual posture of the *Hoiness* case and the quoted language from this Court's opinion in *Hoiness* clearly demonstrate the significant difference between the issue before the Court in *Hoiness* and the issue Petitioner attempts to present to the Court in this case. In *Hoiness* it was clear that the appellant wanted to appeal the dismissal, but he designated the wrong order to do so. Here, the petitioner specifically designated the order or part thereof it intended to appeal—relating to the denial of its motion for new trial—but did not designate the part it now wants to raise—relating to attorney's fees. The "sole issue" raised here was the denial of the motion for a new trial. Accordingly, *Hoiness* is distinguishable from this case and consistent with the opinion of the court below.[2]

In *Foman v. Davis*, 371 U.S. 178 (1962) the district court dismissed the case for failure to state a claim on December 19, 1960, and then on January 23, 1961, denied a motion to vacate and a motion to amend the complaint. Plaintiff appealed only from the January 23

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[1] The Court's reasoning was based upon 28 U.S.C. §777 (1946 ed.), R.S. §954, which was repealed effective September 1, 1948. 62 Stat. 992 §39.

[2] In *United States v. Arizona*, 346 U.S. 907 (1953) (*per curiam mem.*), *rev'g*, 206 F.2d 159 (9th Cir. 1953), and *State Farm Mutual Automobile Insurance Co. v. Palmer*, 350 U.S. 944 (1956) (*per curiam mem.*), *rev'g*, 225 F.2d 876 (9th Cir. 1955), appeals were dismissed by courts of appeals on the grounds that the appeals were taken from the wrong order, and again this Court reversed, citing *Hoiness* without discussion, in *per curiam memoranda* opinions. Accordingly, *Arizona* and *State Farm* are also distinguishable from this case and consistent with the opinion of the court below.

order denying the two motions. The court of appeals dismissed the appeal insofar as it was taken from the original order and judgment of December 19, 1960. This Court reversed, reasoning as follows: "Taking the two notices and the appeal papers together, petitioner's *intention* to seek review of both the dismissal and the denial of the motions was manifest." 371 U.S. at 181 (emphasis added). Thus in *Foman*, as in *Hoiness*, *Arizona*, and *State Farm*, this Court reversed a court of appeals' dismissal for failure to designate the correct order for appeal. Most significant, in *Foman*, this Court indicated that the question of whether a particular notice of appeal is sufficient to confer jurisdiction on the court of appeals is governed by the *intent* of the appellant reflected in the notice of appeal. That is precisely the test applied by the court below in this case and by the other circuits in the numerous cases cited above. The notice of appeal filed by petitioner in the instant case evidenced no intent to appeal the attorney's fees question.

II. This Court Should Not Grant a Writ of Certiorari to Review the Fifth Circuit's Decision on the Evidentiary Issue.

At trial Petitioner sought to place into evidence reports prepared by respondent's sales personnel reflecting contact calls by those sales personnel on respondent's other dealers in the Atlanta area. Respondent objected to the introduction of such evidence and the objection was sustained. The trial court admitted, however, over Respondent's objection, a computer printout showing actual sales of Mercury outboard motors to Respondent's dealers in Georgia during 1970-78. Petitioner seeks a Writ of Certiorari to review the

trial court's exclusion of the contact reports.

A. The Fifth Circuit and the District Court Correctly Determined that the Contact Reports Were Inadmissible.

The trial court correctly excluded the "contact reports" for several reasons. Petitioner contends that the contact reports are admissible to show lost profits under the "yardstick" method of determining lost profits, which allows recovery of lost profits on the basis of the profits of other similar businesses. Here, however, Petitioner had a profit and loss history upon which to base a "before and after" measure of lost profits, and as the Fifth Circuit concluded, the yardstick method is inappropriate where, as here, the plaintiff has a profit and loss history. 649 F.2d at 1053-54.

Antitrust cases relied upon by Petitioner for the proposition that the yardstick method may be used are simply inapplicable here. First, state law, not federal antitrust law, governs the measure of damages in this diversity case. *E.g., L.C.L. Theatres, Inc. v. Columbia Pictures Indus., Inc.*, 619 F.2d 455, 456 (5th Cir. 1980); *Griffin v. Red Run Lodge, Inc.*, 610 F.2d 1198, 1205-06 (4th Cir. 1979); *Koninklijke, Luchtvaart Maatschaapij, N.V. v. United Technologies Corp.*, 610 F.2d 1052, 1055 (2d Cir. 1979); *Klicker v. Northwest Airlines, Inc.*, 563 F.2d 1310, 1316 n.10 (9th Cir. 1977); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 472 (8th Cir. 1977). Petitioner cites no Wisconsin case showing the contact reports to be relevant. In any event this Court should not grant certiorari to review a relevance ruling that is necessarily based partially on state law.

Even if federal law governs or provides guidance on this issue, the law of antitrust damages is inapplicable here. In antitrust cases, the antitrust violator has by virtue of its anticompetitive conduct precluded the plaintiff from establishing an economically accurate history of profitability. Where, as here, the sole basis for liability is a one-shot breach of contract, the plaintiff has had every opportunity to establish a history of profits; accordingly its damages should be measured by that history.

Even assuming that the contact reports had any marginal relevance or materiality, they were properly excluded under Fed. R. Evid. 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

As the court below pointed out, "the reports merely contain general comments from various dealers about their businesses, rather than statistical and financial data . . . . Moreover, only some 13 of 300 reports were tendered in evidence and, thus, there was presented a *very real potential for misconception and distortion.*" 649 F.2d at 1054 (emphasis added). Because of the potential for misconception and distortion created by the contact reports, the cumulative effect of the reports, and the minimal relevance, if any, of the reports, the danger of unfair prejudice and confusion and considerations of undue delay, waste of time, and needless presentation of cumulative evidence substantially out-

weigh the probative value of the reports. Hence, they were properly excluded pursuant to Rule 403.

B. The Trial Court Did Not Exclude All the Evidence of Actual Market Conditions Relating to Plaintiff's Lost Future Earnings, and the Exclusion of the Contact Reports was Thus Harmless Error.

Contrary to the suggestion in Petitioner's phrasing of its Second Issue, the trial court did not exclude all "evidence of actual market conditions relating to plaintiff's lost future earnings." The court admitted computer printouts showing Respondent's *actual* sales to dealers in Georgia for 1970-78. 649 F.2d at 1054. Those computer printouts which the court did admit were a much more reliable indicia of market conditions than the contact reports which were excluded, because they reflected precise statistical and financial data rather than the sort of general comments contained in the contact reports. *Id.* Further the printouts were far more comprehensive than the 13 contact reports the plaintiff sought to introduce; they related to sales to all Mercury dealers in Georgia from 1970 to 1978. *Id.* Accordingly, any error committed by the trial court in excluding the 13 contact reports was clearly harmless. *Id. See* Fed. R. Civ. p. 61.

CONCLUSION

Because the district court and court of appeals correctly decided the issues before them and because Petitioner has presented no issue warranting the grant of a writ of certiorari, Respondent respectfully submits that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted this 20th day of November, 1981.

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